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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/774,161

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EXAMINER

VARGOT, MATHIEU D

ART UNIT

PAPER NUMBER

1791

MAIL DATE

DELIVERY MODE

01/23/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/774,161	Applicant(s) BREESE, D. RYAN	
	Examiner Mathieu D. Vargot	Art Unit 1791	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 06 October 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-15 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-15 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 2, 4, 5, 14 and 15 are rejected under 35 U.S.C. 102(e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Bowling et al for reasons of record as set forth in paragraph 1 of the last office action. Note that applicant has attempted to remove this rejection by stating that the instant invention and Bowling et al were commonly owned. However, to be effective in removing the 103 rejection, the statement must set forth that the claimed invention and the reference were both commonly owned “at the time of invention” of the instant application. Note that such a statement would not remove the 102 rejection, however.

2.Claims 1-5, 14 and 15 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Underwood et al (see col. 4, lines 22-62).

Underwood et al discloses forming a blown HDPE film with a density of .94 to .98 and orienting this film at a draw ratio of 10 (ie, the ratio of the speeds of the drawing rollers-see the examples) whereby the film is stretched 900 %. Note also col. 4, lines 50-55, which teaches that the film made from high density PE would be stretched at least "900% or greater", such seen to read on the instant "draw-down ratio greater than 10:1" as set forth in instant claim 1 or the 11:1 or greater ratio of instant claim 14. Ie, it is submitted that one of ordinary skill in this art would understand that ratios of 900% or greater—9:1 or greater—would encompass ratios of 10 or 11:1 or greater. The instant 1% secant modulus values are seen to be inherent in the 102 rejection. Since the instant steps are met, the film thereby produced must have the instant secant modulus property. If the claims are not anticipated, then it is submitted that they are obvious. One of ordinary skill in the art would realize that a film capable of being stretched at ratios greater than 9:1 would also have been stretched at ratios of 10:1 or 11:1 or greater.

3.Claims 3 and 6-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bowling et al for reasons of record as set forth in paragraph 2 of the last office action.

4.Claims 6-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Underwood et al.

Underwood et al discloses the basic claimed invention as set forth in paragraph 2, *supra*, the applied reference failing to disclose the exact molecular weight of the HDPE. The exact molecular weight of the HDPE is submitted to have been within the skill level of the art, the instant molecular weight ranges being generally well known in the art and dependent on the exact polymerizing conditions, as is also quite well known—ie, it is certainly within the skill level of the art to make a HDPE with the instant molecular weights.

5. Claims 1-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Duckwall, Jr et al for reasons set forth in paragraph 3 of the last office action.

6. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-15 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-16 of

copending Application No. 10/879,763 for reasons set forth in paragraph 4 of the last office action. While it is realized that applicant has filed a terminal disclaimer, the disclaimer has not yet been approved. Upon its approval, the double patenting rejection will be withdrawn.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

7. Applicant's arguments filed October 6, 2008 have been fully considered but they are not persuasive. During an interview with the attorney, it was agreed upon that Bowling et al would be disqualified as prior art. However, it should be noted that the reference can be disqualified as prior art under 103 only if the statement disqualifying it indicates that the invention and the reference were commonly owned "at the time of invention of the instant application". Applicant's statement lacks this feature. Also, even if it had such a recitation, the reference would only be disqualified under 103. Note that a valid 102 has also been applied, since the reference teaches draw ratios of 1-25. Applicant's arguments concerning the 102 rejection applied with respect to the reference are simply not persuasive. Bowling et al discloses orienting a HDPE of the instant density at a ration of from 1-25. This is disclosure enough o anticipate the instant claims and render the instant 1% secant modulus property as inherent. The 103 rejection over Duckwall, Jr et al has been maintained and a 102/103 rejection has been additionally made over newly applied Underwood et al. It is respectfully submitted that a ratio of at least 9:1 or greater would include ratios of greater than 10 or 11:1. Upon approval of the terminal disclaimer, the double patenting rejection will be dropped.

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8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mathieu D. Vargot whose telephone number is 571 272-1211. The examiner can normally be reached on Mon-Fri from 9 to 6.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Christina Johnson, can be reached on 571 272-1176. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

M. Vargot
January 21, 2009

/Mathieu D. Vargot/
Primary Examiner, Art Unit 1791